No. 88-1434

In the Supreme Court of the United States

OCTOBER TERM, 1988

ELIZABETH DOLE, SECRETARY OF LABOR, ET AL.,
PETITIONERS

v.

UNITED STEELWORKERS OF AMERICA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

The Paperwork Reduction Act of 1980 requires, among other matters, that the Office of Management and Budget (OMB) review federal agency information collection activities to determine whether the collection of information is necessary for the proper performance of the functions of the agency. In this case, OMB reviewed and disapproved three provisions of the Secretary of Labor's hazard communication standard, which requires employers to communicate chemical hazard information to their employees. The question presented, which arises in a contempt action against the Secretary of Labor and the Assistant Secretary of Labor for Occupational Safety and Health, is whether the Paperwork Reduction Act's review process applies to agency regulations, developed as part of the agency's statutory mission, that require regulated entities to collect information for disclosure to third parties.

PARTIES TO THE PROCEEDINGS

The petitioners are the Secretary of Labor and the Assistant Secretary for Occupational Safety and Health. The following additional parties participated in the proceedings below: the United Steelworkers of America; Public Citizen, Inc.; Building and Construction Trades Department, AFL-CIO; Associated Builders and Contractors, Inc.; Associated General Contractors of America; Construction Industry Trade Associations; and United Technologies Corporation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 855 F.2d 108.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a-17a) was entered on August 19, 1988. Petitions for rehearing were denied on November 28, 1988 (Pet. App. 18a-21a). The petition for a writ of certiorari was filed on Monday, February 27, 1989, and was granted on May 15, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in the addendum to this brief (Add., *infra*, 1a-25a).

STATEMENT

The Paperwork Reduction Act of 1980 (PRA), 44 U.S.C. 3501 *et seq.*, requires, among other matters, that the Director of the Office of Management and Budget (OMB) review federal agency information collection requirements to determine whether they are necessary for the proper performance of the functions of the agency. In this case, OMB reviewed and disapproved three provisions of the Secretary of Labor's revised hazard communication standard, which requires employers to communicate chemical hazard information to their employees. The United Steelworkers of America and Public Citizen, Inc. (respondents), challenged the disapproval by seeking contempt sanctions against the Director of OMB and the Secretary of Labor, arguing that OMB lacked authority under the PRA to disapprove the pertinent provisions and that the Secretary violated prior court orders when she acceded to OMB's review and disapproval. The court of appeals, while declining to hold the Director or the Secretary in contempt, agreed with the attack on OMB's authority and invalidated the disapproval.

A. The Paperwork Reduction Act

The PRA is intended to minimize the burden and maximize the usefulness of the federal government's many demands for the collection and dissemination of information. See 44 U.S.C. 3501 (1982 & Supp. IV 1986). The PRA assigns principal responsibility for this task to the Director of OMB, who is accountable, among other matters, for establishing federal information policies and overseeing their implementation. See 44 U.S.C. 3504(a) and (b) (1982 & Supp. IV 1986). Specifically, the Director is charged with developing an "information collection request" clearance process, in which he is to review and approve "information collection requests proposed by agencies" and to determine "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency" (44 U.S.C. 3504(c)).

The PRA defines the key term "information collection request" as "a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information" (44 U.S.C. 3502(11) (Supp. IV 1986)). Of the three methods of principal relevance here—reporting requirements, recordkeeping requirements and collection of information requirements—the PRA provides further explanation of the last two. It defines "recordkeeping requirement" as a "requirement imposed by an agency on persons to maintain specified records" (44 U.S.C. 3502(17) (Supp. IV 1986)). And it defines the term "collection of information" as:

> the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either—
>
> (A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
>
> (B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes.

44 U.S.C. 3502(4).

The PRA provides that each federal agency "shall be responsible for carrying out its information management activities in an efficient, effective, and economical manner and for complying with the information policies, principles, standards, and guidelines prescribed by the Director." 44 U.S.C. 3506(a). Furthermore, a federal agency "shall not conduct or sponsor the collection of information" unless the agency (1) has taken action to reduce the paperwork burden; (2) has submitted the proposed information request and associated material to the Director of OMB; and (3) "the Director has approved the proposed information collection request, or the period for [the Director's] review of information collection requests * * * has elapsed." 44 U.S.C. 3507(a) (1982 & Supp. IV 1986).[1]

The statute provides that before the Director approves a proposed "information collection request"—by determining that the collection of information by an agency is "necessary for the proper performance of the functions of the agency" and "will have practical utility"—he "may give the agency and other interested persons an opportunity to be

[1] Section 3504(h)(1) requires an agency to submit a copy of a proposed rule containing collection of information requirements to the Director no later than the date of the publication of the notice of proposed rulemaking. 44 U.S.C. 3504(h)(1). The Director then has 60 days in which to file public comments on the rule's collection of information requirements. 44 U.S.C. 3504(h)(2). In publishing its final rule, the agency must "explain how any collection of information requirement contained in the final rule responds to the comments * * * or explain why it rejected those comments." 44 U.S.C. 3504(h)(3). The Director may disapprove any collection of information requirement contained in a final rule if the agency has failed to comply with Section 3504(h)(1)'s submisssion requirements, if the Director determines that the agency's response to his comments is unreasonable, or if the agency has substantially modified the collection of information requirement contained in the proposed rule. 44 U.S.C. 3504(h)(5)(B), (C) and (D).

heard or to submit statements in writing." 44 U.S.C. 3508. If, however, the Director determines that the collection of information by an agency "is unnecessary, for any reason, the agency may not engage in the collection of the information." *Ibid.*[2]

The PRA instructs the Director of OMB to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." 44 U.S.C. 3516. The PRA also specifies the effect of the Act on existing law. It states:

> Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

44 U.S.C. 3518(a). The PRA further provides:

> Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget, or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

44 U.S.C. 3518(e).

B. The OMB Regulations

The Director of OMB has promulgated regulations, pursuant to 44 U.S.C. 3516, implementing the PRA. See

[2] The PRA provides that, in the case of independent regulatory agencies, the Director's disapproval "may be voided, if the agency by a majority vote of its members overrides the Director's disapproval" (44 U.S.C. 3507(c)).

5 C.F.R. 1302.1 *et seq.* The regulations, which were first issued in 1983 (48 Fed. Reg. 13,689) and were revised in 1988 (53 Fed. Reg. 16,618, 16,623), interpret the statute's requirements and provide additional practical guidance on the meaning of statutory terms and the manner in which OMB conducts its paperwork review.[3]

For example, the OMB regulations provide extensive guidance on the practical application of the statutory term "collection of information." See 5 C.F.R. 1320.7(c). As explained above, the PRA defines this term as "the obtaining or soliciting of facts or opinions by an agency" (44 U.S.C. 3502(4)). The OMB regulations interpret that phrase as including "any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information" (5 C.F.R. 1320.7(c)). More specifically, the OMB regulations explain:

> Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency.* * *

5 C.F.R. 1320.7(c)(2).

The PRA also specifies that an "information collection request" may be conducted through various means, including "reporting or recordkeeping requirement[s] * * * or other similar method[s] calling for the collection of information" (44 U.S.C. 3502(11) (Supp. IV 1986)). The OMB

[3] In this brief, we cite the revised OMB regulations as they will appear in the 1989 Code of Federal Regulations. Our petition for a writ of certiorari cited the regulations as they appear in the 1988 Code of Federal Regulations.

regulations interpret the term "recordkeeping requirement" to include "requirements that information be maintained or retained by persons *but not necessarily provided to an agency*" (5 C.F.R. 1320.7(p) (emphasis added)). And the regulations define "reporting requirement," a term not otherwise defined in the statute, to mean "a requirement imposed by an agency on persons to provide information *to another person* or to the agency" (5 C.F.R. 1320.7(q) (emphasis added)).[4]

The OMB regulations set forth the general requirements that an agency must meet to obtain the Director's approval, pursuant to 44 U.S.C. 3507 and 3508 (1982 & Supp. IV 1986), of an "information collection request." See 5 C.F.R. 1320.4. First, an agency must demonstrate, in accordance with the statutory criteria, that "it has taken every reasonable step" to ensure that:

> (1) The collection of information is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;
>
> (2) The collection of information is not duplicative of information otherwise accessible to the agency; and

[4] The OMB regulations further explain that "[s]imilar methods may include contracts, agreements, policy statements, *plans*, information collection requests, collection of information requirements, rules or regulations, information collection requests or collection of information requirements contained in, derived from, or authorized by such rules or regulations, *planning requirements*, circulars, directives, *instructions*, bulletins, requests for proposal or other procurement requirements, interview guides, oral communications, *disclosure requirements, labeling requirements*, telegraphic or telephonic requests, automated collection techniques, and standard questionnaires used to monitor compliance with agency requirements." 5 C.F.R. 1320.7(c)(1) (emphasis added).

(3) The collection of information has practical utility. * * *.

5 C.F.R. 1320.4(b). Next, OMB will determine, in accordance with 44 U.S.C. 3508, "whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions." 5 C.F.R. 1320.4(c). "In making this determination, OMB will take into account the criteria listed in § 1320.4(b), and will consider whether the burden of the collection of information is justified by its practical utility." 5 C.F.R. 1320.4(c).[5] Finally, "OMB will consider necessary any collection of information specifically mandated by statute or court order, but will independently assess any collection of information to the extent that the agency exercises discretion in its implementation." 5 C.F.R. 1320.4(c)(1).

C. The Present Dispute

The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, is intended "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions" (29 U.S.C. 651(b)). To accomplish this goal, the OSH Act authorizes the Secretary of Labor "to set mandatory occupational safety and health standards applicable to businesses affecting interstate commerce" (29 U.S.C. 651(b)(3)). These standards "require[] conditions, or the adoption or use of one or more practices, means, methods, operations, or processes,

[5] "In determining whether information will have 'practical utility,' OMB will take into account whether the agency demonstrates actual timely use for the information either to carry out its functions or to make it available to the public, either directly or by means of a public disclosure or labeling requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction." 5 C.F.R. 1320.7(o).

reasonably necessary or appropriate to provide safe or healthful employment and places of employment" (29 U.S.C. 652(8)). See 29 U.S.C. 655. The Secretary has promulgated numerous standards regulating occupational exposure to various chemical hazards. See 29 C.F.R. 1910.1000-1910.1101. This suit arises out of the Secretary of Labor's efforts to promulgate a comprehensive hazard communication standard, pursuant to the OSH Act, for the purpose of "ensur[ing] that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees" (29 C.F.R. 1910.1200(a)(1)). The question is whether the Secretary's hazard communication standard is subject to OMB review in accordance with the PRA.[6]

The Secretary first published a hazard communication standard in 1983. That standard, which was limited to the manufacturing sector of the economy, required covered employers to inform their employees of all hazardous substances to which they are exposed in the workplace through the use of container labels, material safety data sheets (MSDSs), and employee training programs. See 29 C.F.R. 1910.1200(a)(2) (1984); 48 Fed. Reg. 53,280 (1983). OMB reviewed and approved the standard under the PRA (*ibid.*). A number of states and employee interest groups objected to the standard on various other grounds and sought judicial review.[7]

[6] The parties have set forth the Secretary's hazard communciation standard, as presently in effect, as well as excerpts of certain federal register notices, in the joint appendix.

[7] The OSH Act specially provides for judicial review of occupational safety and health standards in the court of appeals, and it further provides that "[t]he determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole." 29 U.S.C. 655(f).

The court of appeals rejected most of the challenges to the Secretary's hazard communication standard. See *United Steelworkers of America* v. *Auchter* (*USWA I*), 763 F.2d 728 (3d Cir. 1985). The court disagreed, however, with the Secretary's decision to limit the standard's coverage to the manufacturing sector. The Secretary had explained that he was limiting the standard's coverage based on his determination "to first regulate those industries with the greatest demonstrated need" (48 Fed. Reg. at 53,286). The court concluded, however, that there was record evidence justifying extension of the standard to the non-manufacturing sectors. It therefore directed the Secretary:

> to reconsider the application of the standard to employees in other sectors and to order its application to other sectors unless he can state reasons why such application would not be feasible.

USWA I, 763 F.2d at 736-738, 739.

In response to the court's order, the Secretary reopened the record to gather additional evidence about the economic and technological feasibility of applying the hazard communication standard to non-manufacturing industries. See 50 Fed. Reg. 48,794 (1985). Based on this newly acquired evidence and on the previous rulemaking record, the Secretary initiated a new rulemaking, with the expectation that this would result in a final rule in early 1988. See 52 Fed. Reg. 31,852, 31,854 (1987). Respondents, who were among the parties to the *USWA I* litigation, objected to the new rulemaking and moved the court of appeals to hold the Assistant Secretary in contempt for failing to revise the hazard communication standard based on the existing administrative record. The court of appeals agreed that the regulatory revision should be based on the

existing record and directed, under threat of contempt sanctions, that the Secretary:

> within sixty days of the date of our order, publish in the Federal Register a hazard communication standard applicable to all workers coverd by the OSH Act, including those which have not been covered in the hazard communication standard as presently written, or a statement of reasons why, on the basis of the present administrative record, a hazard communication standard is not feasible.

United Steelworkers of America v. *Pendergrass* (*USWA II*), 819 F.2d 1263, 1270 (3d Cir. 1987) (footnote omitted). Although the federal government disagreed with that ruling, the Solicitor General, after rehearing was denied, determined not to file a petition for a writ of certiorari.

On August 24, 1987, the Secretary complied with the court's order and issued a final revised hazard communication standard covering both the manufacturing and the non-manufacturing sectors of the economy (29 C.F.R. 1910.1200). See 52 Fed. Reg. 31,852. In addition to the extended coverage, the revised standard included several modifications to the original standard designed to make the standard more suitable to the non-manufacturing sector. *Id.* at 31,860. On September 10, 1987, the Department of Labor requested that OMB approve the paperwork requirements associated with the revised standard. Shortly thereafter, OMB held a public meeting, pursuant to the PRA, to solicit comments on the recordkeeping, disclosure, and other paperwork requirements of the revised standard. See 52 Fed. Reg. 36,652 (1987). Subsequently, on October 23, 1987, OMB notified the Department of Labor that it approved all of the proposed regulations, estimated to impose 54 million "burden hours" of paperwork annually, with the exception of three particular

provisions that the Secretary had added to the standard. Pet. App. 22a-44a. It specifically disapproved: (1) "the requirement that [MSDSs] be provided on multi-employer worksites" either through the exchange of MSDSs among employers or their maintenance at a central location at the worksite; (2) the paperwork requirements resulting from "coverage of any consumer product excluded from the definition of 'hazardous chemical' under Section 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986" (*i.e.*, "any substance packaged in the same form and concentration as a consumer product whether or not it is used for the same purpose as the consumer product" (*id.* at 36a)); and (3) the paperwork requirements stemming from "coverage of any drugs regulated by [the Food and Drug Administration] in the non-manufacturing sector" including those not sold in solid, final form. *Id.* at 25a, 43a. See 52 Fed. Reg. 46,076 (1987); 29 C.F.R. 1910.1200(b)(6)(vii), (b)(6)(viii), and (e)(2)(i) (1988).

OMB's disapproval of the first requirement was based on its determination that either of the options provided for in the regulations—mandatory exchange of potentially huge numbers of MSDSs at the worksite or depositing this information at a central location on the worksite—would impose substantial paperwork requirements but would have little, if any, practical utility. See Pet. App. 30a-33a. OMB determined that the relevant information could be made available through less burdensome means. As for the other disapprovals, although OSHA had provided a limited exemption for consumer products if used in the same manner as in normal consumer use, and a limited exemption for drugs in solid form (*i.e.*, tablets or pills), OMB concluded that these exemptions did not go far enough. Specifically, OMB found that the remaining requirements would substantially duplicate the disclosures required by the Consumer Product Safety Commission

(CPSC), would be inconsistent with Environmental Protection Agency (EPA) requirements for consumer products, and would needlessly replicate existing Food and Drug Administration (FDA) disclosures required for drugs. See *id.* at 33a-38a. OMB instructed the Secretary "to revise these requirements * * * or collect new information that would warrant a reconsideration of our decision" (*id.* at 26a).[8]

Respondents returned once again to the court of appeals and requested that court to hold the Secretary of Labor and the Director of OMB (who was not a party to the 1985 or 1987 litigation) in contempt. They argued that the Secretary violated the earlier orders when she acceded to OMB's review and disapproval of portions of the standard, and, more fundamentally, that OMB lacked authority under the Paperwork Reduction Act to disapprove the pertinent provisions of the hazard communication standard. The court of appeals, while declining to hold the Secretary or the Director in contempt, agreed with the attack on OMB's authority and invalidated the disapproval, in effect restoring the standard to the form promulgated by the Secretary. *United Steelworkers of America* v. *Pendergrass* (*USWA III*), Pet. App. 1a-13a. The court recognized that the Paperwork Reduction Act authorizes

[8] On January 14, 1988, the Department of Labor notified OMB that it would initiate a new rulemaking, but further explained that it would not be possible to complete the rulemaking by March 1, 1988, the date specified by OMB. Pet. App. 27a, 45a-48a. In early March, the Department of Labor requested that OMB renew its 1983 approval of the hazard communication standard's paperwork requirements. On April 13, 1988, OMB approved all of the hazard communication standard's paperwork requirements except the three previously disapproved provisions. *Id.* at 49a-58a. The Department of Labor subsequently solicited public comment and has held hearings on what modifications (if any) should be made in light of OMB's disapproval. See 53 Fed. Reg. 29,822 (1988).

OMB to determine "whether the collection of information by an agency is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3504(c)(2)). See Pet. App. 7a. It held, however, that the pertinent provisions of the hazard communication standard "are insulated from OMB authority" because they do not "require the 'collection of information' " and they "embod[y] substantive policy decision making entrusted to [the Secretary of Labor]" (*id.* at 8a).

The court of appeals first reasoned that the two provisions dealing with consumer products and drugs are "*exemptions* from the labeling requirements of the hazard communication standard" (Pet. App. 9a (emphasis in original)) and that "[w]hatever else the terms 'collection of information' or 'information collection requests' may refer to, they cannot possibly refer to these exemptions from labeling requirements" (*ibid.*). The court then concluded that the disapproved provision dealing with information exchange at multi-employer worksites does not involve a "collection of information" because it "requires employers, not to compile, but simply to transmit information to covered employees" (*ibid.*). The court stated that "[t]he exchange requirement no more constitutes the collection of information within the meaning of the [PRA] than do the requirements for preparation of MSDSs by chemical manufacturers or the requirement of preservation of MSDSs by single employers" (*id.* at 11a). The court added that its conclusion was "reinforced" by other language in the PRA that "disaffirms the intention to grant substantive lawmaking authority to OMB" (*ibid.*).

Having addressed the merits, the court of appeals then turned to the question whether the employee groups were entitled to challenge OMB's disapproval through a contempt motion directed at the Secretary of Labor, rather than bringing an action for review of OMB's action pursuant to the Administrative Procedure Act. The court reasoned that the Secretary's withdrawal of the disapproved provisions was inconsistent with the court's prior orders and that relief by motion was therefore appropriate. Pet. App. 12a-13a.

SUMMARY OF ARGUMENT

The Secretary of Labor's hazard communication standard requires employers to collect and retain chemical hazard information and to communicate that information to their employees. The question in this case is whether the Paperwork Reduction Act (PRA) authorizes OMB to review the paperwork burdens imposed by that standard. The Secretary, proceeding in conformity with OMB's regulations and established government practices, submitted the hazard communication standard to OMB for examination and later notified the regulated parties that three disapproved provisions would not go into effect. The court of appeals held, however, that the Secretary's action was improper because OMB lacked authority to review the relevant provisions. The court's decision in this case, which respondents have aptly described as an "idiosyncratic proceeding" (USWA Br. in Opp. 11), is wrong and, if left uncorrected, would seriously compromise a congressionally prescribed mechanism for improving government regulations.

1. The PRA, by its terms, indicates that OMB is required to review the Secretary of Labor's hazard communication standard. The PRA expressly directs OMB to "review[] and approv[e] information collection requests proposed by agencies" (44 U.S.C. 3404(c)(1)), and it expressly defines an "information collection request" as, among other things, a "reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of informa-

tion" (44 U.S.C. 3502(11) (Supp. IV 1986)). The hazard communication standard, and in particular the three disapproved provisions, fall within that definition. The provisions, which require employers to compile, disclose, and distribute chemical hazard information for the benefit of their employees, impose "reporting," "recordkeeping," and "collection of information" requirements. The PRA directs review by OMB of these requirements irrespective of whether the information is provided to the government or directly to third parties.

OMB's implementing regulations likewise define a "collection of information" requirement to include regulatory provisions such as the hazard communication standard. OMB's regulations state, among other things, that a "collection of information" requirement includes an agency demand that persons "obtain, maintain, retain, report, or publicly disclose information" (5 C.F.R. 1320.7(c)). OMB's interpretation is clearly reasonable and entitled to judicial deference. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Deference is particularly appropriate because OMB was intimately involved in the creation of the legislation, its interpretation reflects the construction of the statute by the expert agency charged with its implementation, and OMB has consistently adhered to that interpretation.

2. The court of appeals erred in concluding that the PRA does not give OMB "authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies" (Pet. App. 10a). The PRA specifically instructs OMB to determine whether the agency's proposed collection of information "is necessary for the proper performance of the functions of the agency" (44 U.S.C. 3504(c)(2), 3508). The court of appeals' reliance on other provisions of the PRA which require OMB to exercise its

authority in accordance with existing law (44 U.S.C. 3504(a) (1982 & Supp. IV 1986)) and which provide that the PRA should not be interpreted to increase or decrease OMB's authority with respect to "substantive policies and programs" (44 U.S.C. 3518(e)), is misplaced. Those general provisions do not rescind the express statutory requirement that OMB review whether an agency has chosen effective information collection methods to achieve its regulatory objectives.

The government's position is not only consistent with the statutory language, it promotes Congress's express goal of minimizing paperwork burdens and maximizing the usefulness of government information collection activities. OMB's centralized review of agency information collection requests improves agency decisionmaking by providing an objective "second look" at the agency's information collection requirements to assure that they are useful, are not unduly burdensome, and do not duplicate the requirements imposed by other laws or regulations. The court of appeals' invalidation of this valuable intragovernmental review process only frustrates the development of well-reasoned rules. That result would not only thwart Congress' objectives and the Executive Branch's functions, but it would also increase the Judicial Branch's workload in reviewing potentially defective agency action.

3. This Court need not consult the PRA's legislative history to resolve this case. Nevertheless, the legislative record contains powerful support for OMB's authority to review information collection requests such as the hazard communication standard. The hearings and committee reports indicate that Congress intended the PRA to cover the types of information collection activities involved here and that OMB is entitled to review the paperwork obligations imposed by an agency in seeking to accomplish its "substantive" policies. The legislative history therefore

confirms that the disapproved provisions of the Secretary of Labor's hazard communication standard fall within the PRA's broad definition of information collection requests and that they are subject to OMB review.

ARGUMENT

THE PAPERWORK REDUCTION ACT DIRECTS OMB TO REVIEW THE DISAPPROVED PROVISIONS OF THE SECRETARY OF LABOR'S HAZARD COMMUNICATION STANDARD

Congress enacted the PRA to provide a mechanism for centralized governmental review of agency information collection requests. Detailed regulations implement the PRA and explain the scope of the statute's coverage. Based on the PRA's plain language and OMB's regulations, the Secretary of Labor's hazard communication standard, which requires regulated entities to compile, disclose, and distribute information, properly falls within the PRA's scope and is therefore subject to the Act's requirements.

The court of appeals concluded that OMB lacked authority to review the relevant provisions of the hazard communication standard and ruled that the Secretary's submission of the standard to OMB for PRA review therefore violated the court's previous orders. The court of appeals' decision thus squarely presents the question whether the PRA directs review by OMB of regulatory provisions, such as those involved here, that require entities to compile, disclose, and distribute information. We submit that the court's decision is inconsistent with the language of the PRA, pervasively conflicts with OMB's regulations and established government practices, and would defeat Congress's objective of improving the government's regulatory efforts. This Court should

reverse the judgment below and reinstate OMB's disapproval of the three relevant provisions of the hazard communication standard. The Secretary may then reevaluate and, if necessary, revise those provisions in response to OMB's concerns.[9]

A. The Paperwork Reduction Act And OMB's Implementing Regulations Establish That The Relevant Provisions Of The Hazard Communication Standard Are Information Collection Requests Subject To OMB Review And Approval

The central question in this case is whether the provisions of the hazard communication standard at issue constitute "information collection requests" that are subject to PRA review. The starting point for answering that question is, of course, the PRA's language. *E.g., Community for Creative Non-Violence* v. *Reid,* No. 88-293 (June 5, 1989), slip op. 19. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Since Congress has set forth the PRA's general scope and ap-

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[9] The question presented by our petition and decided by the court of appeals is whether the PRA authorizes OMB to review agency regulations, such as the three disapproved provisions in this case, that require regulated entities to collect information for disclosure to third parties. See Pet. i; Pet. App. 6a-7a. Because OMB directed the Secretary of Labor to reconsider the disapproved provisions (Pet. App. 25a-26a) and the court of appeals held OMB had no such authority, no question is presented at this juncture concerning whether those provisions should or should not ultimately be incorporated as part of the hazard communication standard. If this Court reverses the court of appeals' judgment, that question would arise in the subsequent administrative proceedings. See note 8, *supra*. If the Court affirms the court of appeals' judgment, the question would be moot.

plication in unusually comprehensive terms, the answer turns on a correspondingly narrow issue of statutory construction.

1. As we have explained, the PRA expressly directs OMB to "review[] and approv[e] information collection requests proposed by agencies" (44 U.S.C. 3504(c)(1)). The PRA expressly defines an "information collection request" as, among other things, a "reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information" (44 U.S.C. 3502(11) (Supp. IV 1986)). The issue then is whether the hazard communication standard, and in particular the three disapproved provisions, fall within the express definition of an "information collection request."

Both the original and the revised hazard communication standards—which require employers to compile, disclose, and distribute chemical hazard information—involve a wide variety of "information collection requests." For example, both hazard communication standards require chemical manufacturers to develop hazard information, label their chemical containers, and prepare material safety data sheets (MSDSs) that are then sent to downstream employers that are engaged in businesses that use or distribute chemicals. See 29 C.F.R. 1910.1200(d), (f) and (g). Even though there is no requirement to send this information to the Department of Labor (or any other federal agency), these government-compelled obligations to compile, disclose, and distribute technical information impose—in common parlance and as specifically defined in the PRA—"reporting," "recordkeeping," and "collection of information" requirements.

Although the term "reporting requirement" is not specifically defined by the Act, the accepted definition of the verb "report" includes to "give an account of," "make a written record or summary of," "announce or relate as the

result of a special search [or] examination," and "give notification." *Webster's Third New International Dictionary* 1925 (1976). The adjective "reporting" denotes these same acts, which aptly describe the hazard communication standard's information disclosure and dissemination requirements. The PRA itself defines a "recordkeeping requirement" as a "requirement imposed by the agency to maintain specified records" (44 U.S.C. 3502(17) (Supp. IV 1986)), and it defines the "collection of information" as "the obtaining or soliciting of facts or opinions by an agency" through various means (44 U.S.C. 3502(4)). Thus, those terms encompass the hazard communication standard's compilation, disclosure, and distribution requirements. In addition, we note that there is a substantial overlap between the terms. See 44 U.S.C. 3502(4) (defining the collection of information to include soliciting facts or opinions through reporting or recordkeeping requirements).

Both the original and the revised hazard communication standards also require chemical manufacturers and the downstream employers (1) to prepare a written hazard communication program that describes the manufacturer's or employer's general compliance plan and includes a list of hazardous chemicals known to be present at the worksite (29 C.F.R. 1910.1200(e)); (2) to ensure proper labeling of containers containing hazardous chemicals (29 C.F.R. 1910.1200(f)); and (3) to collect and maintain copies of the MSDSs for chemicals that they use and to make them readily accessible to employees (29 C.F.R. 1910.1200(g)). Chemical manufacturers and downstream employers are further required to provide information and training to their employees with respect to the requirements of the hazard communication standard and chemical hazards in the workplace. These government-compelled obligations to prepare instructions, and to col-

lect, disclose, and distribute information, similarly impose "reporting," "recordkeeping" and "collection of information" requirements. For example, the employers' obligation to disclose hazard information to their employees is a "reporting requirement," the obligation to compile copies of MSDSs is a "recordkeeping requirement," and the obligation to prepare a hazard communication program, including a list of hazardous chemicals, is a "collection of information requirement."

The three specific provisions at issue are an integral part of the hazard communication standard's "information collection requests" and accordingly are subject to PRA review. The first two provisions, which provide that the hazard communication standard "does not apply" to certain consumer products (29 C.F.R. 1910.1200(b)(6)(vii)) and certain FDA-regulated drugs (29 C.F.R. 1910.1200(b)(6)(viii)), are limited exemptions from the standard's general requirements. Since the scope of these exemptions determines the breadth of the hazard communication standard's reporting, recordkeeping, and collection of information requirements, they serve to define the scope of the standard's "information collection requests" and are subject to PRA review. The third provision, which obligates employers to exchange or centrally maintain MSDSs at multi-employer worksites, is itself an "information collection request" subject to PRA review. It plainly constitutes a recordkeeping requirement since it requires employers to collect documents and store them at a specific location.

We therefore submit that the PRA's specific terms demonstrate that OMB was fulfilling its statutory responsibility in reviewing the disapproved provisions of the hazard communication standard. The court of appeals was quite clearly wrong in concluding—without *any* supporting reasoning—that the first two provisions are

immunized from PRA review because the term " 'information collection requests' * * * cannot possibly refer to these exemptions from labeling requirements" (Pet. App. 9a).[10] Since the hazard communication standard contains information collection requests, an exemption from those requests defines the scope of the paperwork obligation imposed by the agency and is subject to PRA review. The court of appeals also erred in concluding that the third disapproved provision is immune from PRA scrutiny. The court stated that "[t]he multi-employer MSDS exchange provision requires employers, not to compile, but simply to transmit information to covered employees" (*ibid.*), adding that the PRA is aimed exclusively "at reducing the burden of paperwork required by the federal government for its own regulatory or statistical purposes" (*id.* at 10a). That reasoning is incorrect.[11]

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[10] The court of appeals mistakenly characterized these provisions as "exemptions from labeling requirements" (Pet. App. 9a). The exemptions involved here relieve the employer not only from labeling requirements (cf. 29 C.F.R. 1910.1200(b)(5)), but from all of the standard's requirements with respect to those products, including MSDS collection, retention and distribution, and employee training. In any event, labeling requirements are reporting requirements subject to OMB review. See 5 C.F.R. 1320.7(c).

[11] The court of appeals erred in stating that the multi-employer exchange provision does not require employers to compile information. Under that provision, an employer at a multi-employer worksite must either exchange MSDSs with other employers or, together with other employers, make their MSDSs available at a central worksite location. Either option surely entails the "compilation" of information. In any event, PRA review authority does not turn on distinctions between compilation and transmittal of information. The PRA instructs the OMB to "review[] and approv[e] information collection requests proposed by agencies" (44 U.S.C. 3504(c)(1)). The multi-employer exchange provision clearly is an information collection request because it imposes, at a minimum, a "recordkeeping requirement" (44 U.S.C. 3502(11) (Supp. IV 1986)).

As we have explained, the PRA expressly defines the term "information collection request" to include methods, such as reporting or recordkeeping requirements, "calling for the collection of information" (44 U.S.C. 3502(11) (1982 & Supp. IV 1986)). That definition indicates that the PRA's review provisions are triggered by a government request for information collection, regardless of whether the party charged with gathering the information is required to retain it, transmit it to the government, or disseminate it to third parties. The PRA's definition of the term "collection of information" echoes that point. It defines that term disjunctively to include "the obtaining *or soliciting* of facts or opinions by an agency" (44 U.S.C. 3502(4) (emphasis added)). Thus, an agency request that parties gather or develop facts or opinions results in a "collection of information" regardless of whether the government—or some other entity—ultimately obtains the resulting data.

Indeed, the court of appeals' suggested distinction between the paperwork associated with the hazard communication standard and "paperwork required by the federal government for its own regulatory or statistical purposes" (Pet. App. 10a) is illusory. The Secretary of Labor has no authority to require "paperwork" *except* for "regulatory purposes." The hazard communication standard and its associated information collection requests are intended to promote the Secretary's regulatory objective of informing employees of workplace chemical hazards.[12]

[12] The court of appeals also suggested in dicta that even "the requirements for preparation of MSDSs by chemical manufacturers or the requirement of preservation of MSDSs by single employers" do not constitute "the collection of information within the meaning of the [PRA]" (Pet. App. 11a). As we have explained (see p. 20-22, *supra*), those reporting and recordkeeping requirements are plainly subject to PRA review.

By the same token, respondents' suggestion that PRA review "applies only to information collected for governmental use" (USWA Br. in Opp. 19) also fails. The government certainly "uses" the hazard communication standard's information collection requests to promote employer communication of workplace chemical hazards. In fact, the government itself has direct access to the resulting collections of information to fulfill its enforcement responsibilities under the OSH Act.[13] Thus, respondents' argument necessarily reduces to an assertion that the PRA should not apply where the government imposes information collection requests primarily to provide direct disclosure of information to third parties. The PRA's definition of the term "information collection request" indicates, however, that the PRA does apply in that circumstance.

2. We submit that the PRA is sufficiently clear that the judgment of the court of appeals should be reversed on the basis of the statutory language alone. See *Bethesda Hospital Ass'n* v. *Bowen*, 108 S. Ct. 1255, 1258 (1988). But even if the PRA were silent or ambiguous with respect to the specific issue, a court should not "simply impose its own construction on the statute" (*Chevron U.S.A.*, 467 U.S. at 843). It is well settled that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" (*id.* at 844). OMB, which is charged with implementing the PRA, has issued regulations that provide specific guidance on the question presented in this case. The agency's interpretation is controlling if it "is based on a permissible construction of the statute" (*id.* at 843).

[13] The hazard communication standard specifically provides that an employer must make the written hazard communication program and MSDSs available, upon request, to the Assistant Secretary. See 29 C.F.R. 1910.1200(e)(4) and (g)(11).

OMB prepared its regulations in accordance with Congress's express directive to "promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter." 44 U.S.C. 3516. Those regulations (which the court of appeals did not even acknowledge) specifically and unambiguously address the precise question at issue in this case: whether the critical statutory term "information collection request"—which is defined to include a "reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information"—includes agency initiatives requiring the collection of information for disclosure to third parties.

The regulations give considerable attention to the meaning of the term "collection of information." They recognize that the PRA defines a "collection of information" to include "the obtaining or soliciting of facts or opinions by an agency through the use of * * * reporting or recordkeeping requirements, or other similar methods" (44 U.S.C. 3502(4)). See 5 C.F.R. 1320.7(c). But the regulations explain, in accordance with the common meaning of the words used, that the "soliciting of facts or opinions" can include an agency demand that persons "obtain, maintain, retain, report, or publicly disclose information" (5 C.F.R. 1320.7(c)). OMB's regulations further state:

> Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency. * * *.

5 C.F.R. 1320.7(c)(2). OMB's implementing regulations thus construe a "collection of information" requirement to include regulations such as the Secretary of Labor's hazard communication standard.

The regulations also define the other terms that are included in the definition of an "information collection request" in such a manner as to make clear that they apply to information collected for the benefit of third parties. OMB's regulations specify that a "reporting requirement" can include an agency requirement that a person "provide information to another person" (5 C.F.R. 1320.7(q)), and that a "recordkeeping requirement" can include an agency requirement "that information be maintained or retained by persons but not necessarily provided to an agency" (5 C.F.R. 1320.7(p)). They also provide that "similar methods" can include "disclosure requirements," "labeling requirements," "plans," and "instructions" (5 C.F.R. 1320.7(c)(1)). See note 4, *supra*. There can be little doubt then that under OMB's regulations the hazard communication standard's provisions requiring employers to communicate hazard information to employees through compilation and maintenance of MSDSs, labeling, and written training requirements constitute an information collection request. Furthermore, that interpretation is clearly reasonable and entitled to judicial deference. *Chevron U.S.A.*, 467 U.S. at 843-845. As this Court recently observed, where "the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency's interpretation of the statute." *K mart Corp.* v. *Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988).

In this case, OMB's regulatory interpretation is not only the most sensible construction of the specific language at

issue, but it also is manifestly consistent with the PRA's objectives, as expressed by "the language and design of the statute as a whole." *K mart Corp.*, 108 S. Ct. at 1817. The PRA's stated purpose is to minimize the public's paperwork burdens while maximizing the usefulness of information that must be collected, maintained, or disseminated pursuant to federal requirements. 44 U.S.C. 3501 (1982 & Supp. IV 1986). These objectives are no less relevant and important when a federal agency requires persons to collect information and disseminate it to third persons, than when an agency requires such persons to collect information and transmit it to the agency itself. Indeed, the D.C. Circuit recently recognized that point in *Action Alliance of Senior Citizens* v. *Bowen*, 846 F.2d 1449 (1988), petition for cert. pending, No. 88-849. In *Action Alliance*, OMB had exercised its authority under the PRA's predecessor statute—the Federal Reports Act of 1942, 44 U.S.C. 3501 *et seq.* (1976)—to disapprove, in part, a Department of Health and Human Services regulation requiring federal funds recipients to perform a "self-evaluation" of their compliance with the Age Discrimination Act of 1975, 42 U.S.C. 6101 *et seq.*, and to make that self-evaluation available on request to the agency and the public. The court of appeals affirmed OMB's action, rejecting as "pure pettifoggery" (846 F.2d at 1453) the appellants' claim that the term "collection of information" includes only data submitted to the agency. The court explained:

> Appellants cannot seriously believe that in enacting the Reports Act Congress was concerned solely or primarily with private parties' costs of *mailing* data to Washington; it is the record-keeping and data-gathering that constitute the burden. Moreover, OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term "collection of information" for nearly half a century to encompass "[a]ny general or specific requirement for the *establishment or maintenance* of records . . . which are to be used *or be available for use* in the collection of information." * * * Even under the deference we owe the agency, * * * we doubt we could uphold a view of the Reports Act that made physical delivery to an agency essential to the notion of "collection of information." Happily we confront no such oddity.

846 F.2d at 1453-1454.[14]

OMB's regulatory interpretation is not only sensible, it also has other characteristics that counsel in favor of judicial deference. For example, OMB was intimately involved in the creation of the legislation. See *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549 (1940). See pp. [38-41], *infra*. This Court has noted that "[a]dministrative interpretations are especially persuasive where, as here, the agency participated in developing the provision." *Youakim*, 440 U.S. at 144. In addition, OMB's

[14] As the D.C. Circuit recognized, OMB's interpretation is an extension of the Bureau of the Budget's practices under the PRA's predecessor statute, the Federal Reports Act. The Bureau of the Budget, and later OMB, interpreted the Federal Reports Act to require "clearance" of agency "plans or forms" used to conduct or sponsor the collection of information. See Bureau of the Budget Regulation A (Feb. 13, 1943). We have reproduced Regulation A, which the D.C. Circuit quotes, in the Addendum to this brief. See pp. 16a-25a, *infra*. As the court noted, Regulation A specifically defined a "plan" to include "[a]ny general or specific requirement for the establishment or maintenance of records * * * which are to be used or be available in the collection of information." See Add., *infra*, 17a. Thus, OMB and its predecessor, the Bureau of the Budget, have reviewed record-keeping requirements that do not entail the transmission of information to the agency for nearly 50 years.

regulations represent the construction of a statute by an agency " 'charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' " *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978) (quoting *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933)).

Furthermore, as our petition for a writ of certiorari explained, OMB has consistently applied its regulatory interpretation to a wide variety of information collection activities similar to those presented in this case, including Environmental Protection Agency (EPA) community right-to-know disclosures (52 Fed. Reg. 38,344 (1987)), Federal Trade Commission (FTC) textile fiber products identification disclosures and fair packaging and labeling disclosures (53 Fed. Reg. 5986 (1988); *id.* at 13,159), and Food and Drug Administration (FDA) nutrition labels (52 Fed. Reg. 28,607 (1987)), as well as numerous other federally mandated disclosures. See Pet. 17-18. Indeed, as the D.C. Circuit recognized, OMB's interpretation is an extension of the Bureau of the Budget's established practices under the PRA's predecessor statute, the Federal Reports Act of 1942. "This longstanding and consistent interpretation is entitled to considerable weight." *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450.[15]

Finally, we consider it significant that OMB and the Secretary of Labor have consistently agreed that the

[15] Congress amended and reenacted the PRA since OMB's 1983 promulgation of its regulations, see Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-591, Tit. VIII, 100 Stat. 3341-335, yet in so doing gave no indication that it disagreed with OMB's interpretation. Congress's failure to criticize or overrule the agency's 1983 regulations provides an additional basis for inferring that OMB has correctly gauged Congress's intent. See, *e.g.*, *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

hazard communication standard is subject to PRA review. The Secretary's notices of proposed rulemaking and final rules have uniformly recognized that OMB review is required by the PRA. See 47 Fed. Reg. 12,092, 12,111 (1982) (J.A. 36-37); 48 Fed. Reg. 53,280 (1983) (J.A. 38-39), 52 Fed. Reg. 31,852, 31,870 (1987) (J.A. 40, 47-48); 53 Fed. Reg. 29,822, 29,826, 29,849-29,850 (1988) (J.A. 49, 63-64, 102-103). When two Executive Branch agencies agree that intra-governmental review is proper in developing an effective regulation, courts should be especially reluctant to interfere with that cooperative process.

B. OMB's Review Does Not Impermissibly Increase OMB's Authority With Respect To The Substantive Policies And Programs Of The Department Of Labor

The court of appeals offered a second reason for denying OMB authority to review the relevant provisions of the Secretary of Labor's hazard communication standard. The court suggested that the PRA does not give OMB "authority to second guess other federal agencies with respect to the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies" (Pet. App. 10a). See also Pet. App. 8a, 11a. The court's interpretation of the PRA is incorrect and would defeat the PRA's basic purposes.

1. Section 3508 of the PRA sets forth the standard that OMB must apply in reviewing information collection requests. It states in relevant part:

> Before approving a proposed information collection request, [OMB] shall determine *whether the collection of information by an agency is necessary for the proper performance of the functions of the agency*, including whether the information will have practical utility. * * *. To the extent, if any, that the Director

> determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

44 U.S.C. 3508 (emphasis added). See also 44 U.S.C. 3504(c). Thus, the PRA states in the clearest possible terms that OMB shall review agency information collection requests specifically to determine whether the agency's proposed paperwork requirements are necessary to accomplish the agency's functions. Indeed, the Act specifically provides that "the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities *is subject to the authority conferred on the Director by this chapter*" (44 U.S.C. 3518(a) (emphasis added)).

The court of appeals' contrary conclusion apparently resulted from its exclusive focus on two other provisions of the PRA, Sections 3504(a) and 3518(e). Section 3504(a), which describes OMB's general responsibilities under the PRA, states that OMB shall exercise its authority "consistent with applicable law." Section 3518(e), which describes the PRA's relationship to other laws, states that the statute shall not be interpreted "as increasing or decreasing the authority of the President, [OMB], or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices." These provisions, particularly when read in conjunction with Section 3508 and Section 3518(a), do not support the court of appeals' conclusion.

Section 3504(a)'s general requirement that OMB exercise its authority "consistent with applicable law" does not prevent OMB from discharging its statutorily conferred responsibility to disapprove agency information collection requests that are not "necessary for the proper performance of the functions of the agency" (44 U.S.C. 3508).

The "consistency" provision obviously should not be read to rescind other provisions of the PRA. To hold otherwise "would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947). Rather, the "consistent with applicable law" provision simply directs OMB to carry out its various regulatory and information management activities in accordance with such generally applicable statutes as the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, the Privacy Act of 1974, 5 U.S.C. 552a, and government procurement laws. In any event, since the PRA *requires* OMB to disapprove unnecessary information collection requests, and we know of no laws requiring agencies to collect information that they do *not* need "for the proper performance" of their functions, OMB's exercise of its disapproval authority necessarily is "consistent with applicable law."

OMB's disapproval authority also is entirely compatible with Section 3518(e). The court of appeals interpreted that provision, which counsels that the PRA should not be interpreted as increasing or decreasing OMB's authority "with respect to the substantive policies and programs" of other agencies (44 U.S.C. 3518(e)), as "disaffirm[ing] the intention to grant substantive lawmaking authority to OMB" (Pet. App. 11a). But as this Court recently explained, "the terms 'substance' and 'procedure' precisely describe very little except a dichotomy, and what they mean in a particular context is largely determined by the purposes for which the dichotomy is drawn." *Sun Oil Co.* v. *Wortman*, 108 S. Ct. 2117, 2124 (1988). See also *Mistretta* v. *United States*, 109 S. Ct. 647, 655 (1989).

In the case of the PRA, Congress drew a distinction between OMB's statutory duties—including its expressly defined authority to disapprove burdensome and un-

necessary paperwork requirements – and other activities unrelated to paperwork reduction. What the substantive/non-substantive distinction means in this context, therefore, is simply that OMB's authority over an agency's policies and procedures under the PRA extends *only* to the review of information collection requests, and no further. The distinction does not – and could not – mean that OMB has *no* authority under the PRA to redirect agency policies and programs insofar as they entail excessive or burdensome paperwork requirements.[16] As in the case of Section 3504(a), construing Section 3518(e) in that fashion would result in imputing to Congress an improbable intent to "paralyze" the PRA's information collection review process. *Clark*, 332 U.S. at 489.[17]

[16] As commentators have recognized, because the PRA expressly gives OMB broad authority to determine whether information is necessary for the proper performance of an agency's functions, OMB review inevitably will affect agency activities, including policies and programs that might be deemed – in the abstract – to be "substantive." See Funk, *The Paperwork Reduction Act: Paperwork Reduction Meets Administrative Law*, 24 Harv. J. on Legis. 1, 104-110 (1987); Note, *The Paperwork Reduction Act in* United Steelworkers *v.* Pendergrass: *Undue Restriction and Unrealized Potential*, 89 Colum. L. Rev. 920, 931-932 (1989). As those commentators also have recognized, Congress must have intended that result. See Funk, *supra*, 24 Harv. J. on Legis. at 108 ("This second-guessing by OMB seems clearly intended by the Act."); Note, *supra*, 89 Colum. L. Rev. at 932 ("It would be illogical to assume Congress did not recognize that such broad OMB powers would have an impact on other agency mandates.").

[17] Respondent Public Citizen has suggested that "[e]ntirely aside from OMB's responsibilities under the PRA, OMB has sweeping authority under Executive Orders 12,291 and 12,498 to supervise comprehensively the development of any regulatory action that imposes a paperwork requirement" (P.C. Br. in Opp. 4), and "to review any information collection and dissemination activities imposed by an Executive Branch agency" (*id.* at 7). Under that view, the PRA's grant of

2. The court of appeals thus erred in concluding that the PRA does not require OMB to review "the kinds of disclosure needed to accomplish substantive policies entrusted to such agencies" (Pet. App. 10a). The statutory text plainly imposes such an obligation. Sections 3504, 3508, and 3518 are completely compatible and, when read in context, they produce a harmonious and sensible result. As a general matter, they recognize that while an agency has authority to determine, in accordance with its statutory mandate, its regulatory objectives, OMB is required to review whether the agency has chosen effective information collection methods to achieve those objectives. That result is consistent with the statutory language and promotes Congress's express objective of minimizing the paperwork burden and maximizing the usefulness of government information collection activities. See 44 U.S.C. 3501 (1982 & Supp. IV 1986).

The court of appeals' reasoning in this respect rests on a deeper fallacy. Far from "thwarting" or "frustrating" agency policymaking prerogatives, OMB's centralized review of information collection requests improves agency decisionmaking. OMB has developed expertise in the specialized discipline of information management. See generally *Information Management in Public Administration* (F. Horton & D. Marchand ed. 1982). Its role as a government-wide reviewer of agency information collection requests gives it an especially knowledgeable perspective on the effectiveness and practical utility of agency paperwork requirements. And it can provide special insights based on its familiarity with other information collection activities within the government. See generally

disapproval power would not, in any event, result in any increase in OMB's "authority * * * with respect to the substantive policies and programs of departments, agencies, and offices" (44 U.S.C. 3518(e)).

Sierra Club v. *Costle*, 657 F.2d 298, 404-408 (D.C. Cir. 1981). Thus, by allowing OMB to provide an objective "second look" at an agency's collection of information requirements in order to assure that they are useful, are not unduly burdensome, and do not duplicate the requirements imposed by other laws or regulations, the PRA's review process improves the quality of the agency's efforts to implement its own programs and policies.

OMB's review of the three disapproved provisions in this case illustrates how that process was meant to work and how it can provide a valuable mechanism for improving agency decisionmaking. In extending the hazard communication standard to embrace the entire economy, the Secretary modified the standard's requirements in light of a number of situations that generally are not encountered in the manufacturing sector. See 52 Fed. Reg. 31,852 (1987) (J.A. 40-47). The Secretary of Labor determined, among other matters, that the standard should assure that employees at multi-employer worksites have access to hazard information concerning all of the hazards at the site and that the standard should provide an exemption from its coverage for consumer products and drugs that do not present genuine workplace hazards. *Ibid.* OMB did not disagree with those determinations. Rather, its review was limited to whether the paperwork requirements associated with those objectives were necessary, including whether the information collection requests imposed by the Secretary's regulation would have "practical utility" (44 U.S.C. 3504(c), 3508).

More specifically, OMB solicited comments from interested parties and, based on the resulting record, found that the Secretary had failed to provide an adequate justification for its three modifications. See 52 Fed. Reg. 46,076 (1987) (Pet. App. 22a-44a). Although OMB disapproved the Secretary's methods in those three respects,

thus preventing their enforcement, OMB also suggested alternative methods that OMB believed would achieve the Secretary's regulatory goals. *Ibid.* In addition, OMB directed the Secretary to take action "to revise these requirements * * * or collect new information that would warrant a reconsideration of our decision" (*id.* at 26a). The Secretary has subsequently solicited public comment [illegible]earings on what modifications (if any) should be [illegible] of OMB's disapproval. See 53 Fed. Reg. [illegible]88) (J.A. 49-102). Clearly, completion of the supple[illegible]ital rulemaking, including further OMB review, should result in a better-reasoned rule.

As previously explained, OMB's reasons for disapproving the three provisions were that multi-employer worksite provisions imposed substantial burdens without associated benefits (Pet. App. 30a-33a), that the Secretary's consumer product exemption was incongruous with CPSC's requirements as well as with EPA's related exemption under its community right-to-know regulations (*id.* at 33a-36a), and that the Secretary's drug exemption would result in substantial duplication of disclosures already required by the FDA (*id.* at 37a). By requiring the Secretary to reconsider these provisions, OMB ensured that the Secretary would either supply additional justification for the original provisions or make appropriate revisions based on the expanded rulemaking record. The court of appeals' judgment holding that the PRA review process cannot be applied in the circumstances presented by this case can result only in devaluing the governmental interest in reducing paperwork burdens created by regulatory processes. That result would not only thwart Congress's objectives and impair Executive Branch functions, but it also would needlessly increase the Judicial Branch's burdens in reviewing potentially defective rules.

C. The Paperwork Reduction Act's Legislative History Indicates That Congress Intended To Require OMB Review In These Circumstances

As we have explained, the PRA's express terms direct OMB to review the disapproved provisions of the Secretary of Labor's hazard communication standard. To the extent that "the statute is silent or ambiguous" (*Chevron U.S.A.*, 467 U.S. at 843), OMB's exercise of its authority "is based on a permissible construction of the statute" (*ibid.*). Thus, the Court need go no further. Nonetheless, we think it is relevant that the PRA's legislative history strongly supports OMB's obligation to review the information collection activities such as the hazard communication standard. The legislative record demonstrates, in particular, that Congress intended the PRA to cover the types of information collection activities involved here and that OMB is entitled to review the paperwork obligations imposed by an agency as a method of accomplishing the agency's "substantive" policies.

The PRA was an outgrowth of Congress's efforts to update the Federal Reports Act of 1942 and, more generally, to reduce government paperwork burdens and improve the government's use and management of information. In 1974, Congress established the Commission on Federal Paperwork "to reexamine the policies and procedures of the Federal Government which have an impact on the paperwork burden" (Act of Dec. 27, 1974, Pub. L. No. 93-556, § 1, 88 Stat. 1789). The Commission's members included the Director of OMB, who was responsible for reviewing the information collection activities of Executive Branch agencies under the Federal Reports Act (44 U.S.C. 3506, 3509 (1976)), and the Comptroller General, who was responsible for reviewing the information collection activities of independent agencies under that Act (44 U.S.C. 3512 (1976)). See § 4, 88 Stat. 1790.

In 1977, the Commission on Federal Paperwork issued a study entitled *The Reports Clearance Process* (Sept. 9, 1977) that described some of the shortcomings of the Federal Reports Act's review process. That study explained:

> The Act is not clear on its coverage of a major portion of the paperwork burden – recordkeeping requirements – although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines.

Id. at 1. The study further noted that "[n]ot all agencies covered by the Federal Reports Act comply fully with its requirements" (*ibid.*). The study later explained:

> For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine. The SEC took a similar position with regard to the information needed in enforcing the disclosure requirements of the securities laws.

Id. at 43.[19]

[19] The Comptroller General made the same point in a 1976 report to Congress:

> SEC believes that some of its activities involve collection of information subject to 44 U.S.C. 3512, but other SEC responsibilities involve the "disclosure" of information to the public rather than collection activities, and accordingly, are not subject to that provision.

Report to Congress by the Comptroller General, *Status of GAO's Responsibilities Under the Federal Reports Act*, OSP-76-14 at 15 (May

In 1979, Senator Chiles introduced legislation to amend the Federal Reports Act (S. 1411, 96th Cong., 1st Sess.), and the following year, Representative Brooks introduced similar legislation (H.R. 6410, 96th Cong., 2d Sess.). In each instance the proposed legislation gave OMB centralized authority to review information collection requests, specifically clarifying, through the definition of the terms "information collection request" and "collection of information" that government-imposed record-keeping requirements and other similar requirements would be subject to OMB review. See S. 1411, *supra* (§ 3502(5) and (6)); H.R. 6410, *supra* (§ 3502(2) and (9)). Furthermore, both bills specifically authorized OMB to review the information collection requests of independent agencies, such as the SEC, but allowed those agencies to "override" OMB's decision to disapprove specific requests. See S. 1411, *supra* (§ 3509); H.R. 6410, *supra* (§ 3507).

In subsequent hearings, OMB and the Comptroller General testified and submitted comments in favor of the legislation, specifically noting that the proposed changes would cure the previously cited deficiencies in the Federal Reports Act. See *Paperwork and Redtape Reduction Act of 1979: Hearing on S. 1411 Before the Subcomm. on*

28," 1976). The Comptroller General further explained that "[t]he underlying reasons for these agencies' refusal to submit most of their forms to us for clearance are that they believe this would be an intrusion into their regulatory responsibilities" (*id.* at 16). He recommended that Congress clarify the Federal Reports Act "to allow the clearance agency to challenge the need for regulatory information" (*id.* at 20). The Comptroller General subsequently provided his report to the Senate subcommittee with responsibility for paperwork reduction legislation. See *Efforts to Reduce Federal Paperwork Burdens: Hearing Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs*, 95th Cong., 2d Sess. 45, 66 (1978).

Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs, 96th Cong., 1st Sess. 24-60, 119-125 (1979) [hereinafter *S. 1411 Hearings*]; *Paperwork Reduction Act of 1980: Hearings on H.R. 6410 Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 2d Sess. 35-60, 88-108 (1980) [hereinafter *H.R. 6410 Hearings*].

Representatives of several independent agencies, including the SEC, objected to a number of the proposed changes, contending that the legislation's definition of "collection of information" was too broad and that the legislation would substantially undermine their regulatory independence. See *S. 1411 Hearings* 61-87; *H.R. 6410 Hearings* 313-336. For example, Commissioner Evans of the SEC stated:

> In our view, the definition of collection of information in the Federal Reports Act under current law is limited to collection for statistical purposes and does not authorize review of disclosure or enforcement related information gathering.
>
> By contrast, the definition of "collection of information" in section 3502 of this bill which makes any request for information to 10 or more persons in a standard form subject to the approval provisions of the bill appears to be far more extensive. This expansion of the Federal Reports Act is of major concern to us.
>
> * * * * *
>
> Moreover, the standards in section 3507[19] demonstrate that it should not apply to the Commission's

[19] Section 3507 of S. 1411 provided that OMB would determine whether "the collection of information by a Federal agency is necessary for the proper performance of the functions of the agency and has practical utility for the agency." See *S. 1411 Hearings* 100.

> requirements for disclosure to the public. These standards are based on the Government's need for information, but Commission disclosures are based on the need of the public for the information; the information does not have practical utility to the Commission, but rather to the public.

S. *1411 Hearings* 67-68. Senator Chiles viewed the independent agencies' objections skeptically, asking the representatives of the SEC and the Federal Communication Commission (FCC) "why is it, each of your independent regulatory missions are any different from that of any executive agency regulatory mission like EPA or OSHA?" (*id.* at 84). He later added,

> Well, you both make very persuasive arguments for the independence of your agencies and the sensitivity of what you are protecting.
>
> However, I fail to see that that is more persuasive than the environmental protection of this country. I fail to see that it is more sensitive. I fail to see that there is less pressure by concerns that would be trying to stop reports of regulations in regard to environmental matters or the safety of workers at the workplace.

S. *1411 Hearings* 85.[20]

[20] Senator Chiles later returned to the theme that the independent regulatory agencies should be subject to the same review as EPA and OSHA, stating:

> We are talking about not wanting to cripple the mission of the independent regulatory agencies nor the mission of the executive agencies like EPA and OSHA and all of the other agencies that are vital to the well-being of this country. But at the same time, we are trying to put some governor on this thirst for information and some rational decisionmaking processes that Congress can review and that the people can hold accountable, and that we can say we are trying to get a handle on.

S. *1411 Hearings* 87.

The House and Senate Committees decided to retain the broadened definitions of the terms "information collection requests" and "collection of information." The House Report on H.R. 6410 explained that "the OMB Director is to ensure that the agencies, in developing rules and regulations, use efficient methods to collect, use, and dissseminate the necessary information." H.R. Rep. No. 835, 96th Cong., 2d Sess. 9 (1980). The Report noted that "recordkeeping requirements are specifically included in the reports clearance process" (*id.* at 19). The Senate Report on S. 1411 agreed. See S. Rep. No. 930, 96th Cong., 2d Sess. 13 (1980). It added that the definition of the term "recordkeeping requirement" "includes information maintained by persons which may be but is not necessarily provided to a Federal agency" (*id.* at 40). The Senate Report further explained that

> [T]he term "collection of information" has been clarified to eliminate the possibility that information collections be interpreted to apply only to situations where answers provided by respondents are to be used for statistical compilations of general public interest. This interpretation, which has been employed by the [SEC], will not have any foundation.

Id. at 13. Accord H.R. Rep. No. 835, *supra*, at 19. The Senate Report also explained:

> The "collection of information" definition does not change the scope of current authority and practice by the Director of OMB and the Comptroller General to promulgate rules and regulations needed to inter-

> pret the relationship of certain kinds of information to the definition of collection of information.

S. Rep. No. 930, *supra*, at 39. The Committee Reports specifically addressed the SEC's objections at the hearings that OMB oversight of agency information collection activities would intrude on their "substantive" policies. The House Report stated:

> SEC [s]trongly recommended that H.R. 6410 be amended to narrow the definition of "collection of information" to exclude reporting required in connection with statutorily-authorized regulatory, enforcement, or oversight efforts. SEC believes that the current Federal Reports Act definition is limited to collection for statistical purposes and does not authorize review of disclosure- or enforcement-related information gathering.
>
> The Committee agrees with both FCC and SEC as to the close relationship between policymaking and information management. However, regulatory agencies in the executive branch, such as EPA, have been able to justify to OMB their need for information used to establish policy or for other purposes. The independent regulatory agencies should also be capable of doing so. * * *. The Committee's intent in making the changes in the definition was to clarify the existing definition to force SEC and any others who might apply a restrictive interpretation to comply with statutory information collection clearance requirements.

H.R. Rep. No. 835, *supra*, at 23. The Senate Report also responded to the SEC's concern regarding the application of the concept of "practical utility" to public disclosure requirements:

> Information is also collected to form the basis for disclosure to the public. For example, documents filed with the Securities and Exchange Commission by issuers of securities and by other persons subject to the Federal securities laws are designed for use by persons making investment and other financial decisions. In this connection, Federally-mandated disclosures to the public by issuers and certain owners of securities are central to carrying out the purposes of the Federal securities laws. Therefore, in considering whether information will have practical utility, the Director should consider, among other things, whether the agency can use the information either to carry out its regulatory or other functions or to make it available to the public for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction.

S. Rep. No. 930, *supra*, at 39-40.

The House and the Senate each passed substantially similar bills (126 Cong. Rec. 6216-6217, 30,190-30,193 (1980)), and the House later agreed to the Senate version of the bill (*id.* at 31,222-31,228) without the need for a conference report. The legislative debates and floor amendments are consistent with the statements contained in the Committee Reports. See *id.* at 6208-6214, 30,170-30,179. In 1986, Congress reauthorized the PRA. See Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-591, Tit. VIII, 100 Stat. 3341-335. Congress's reauthorization, if anything, reinforced the PRA's broad coverage.[21]

[21] Congress retained the definitions contained in the PRA but clarified that an "information collection request" includes a "collection of information requirement" (§ 812(1), 100 Stat. 3341-335). See S. Rep. No. 347, 99th Cong., 2d Sess. 52 (1986). The purpose of this amendment was to make clear that the PRA's requirements concerning "information collection requests" also applied to "collection of information requirements" contained in existing or proposed rules. *Ibid.*

Thus, the PRA's legislative history confirms that the statute means what it says. The PRA's broad definition of "information collection requests" was intended to reach agency regulations, developed as part of the agency's statutory mission, that require regulated entities to gather or retain information for disclosure to third parties. The disapproved provisions of the Secretary of Labor's hazard communication standard fall within the statutory definition and are subject to OMB review.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JUNE 1989

* The Solicitor General is disqualified in this case.

ADDENDUM

STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* (1982 & Supp. IV 1986)

§ 3501. Purpose

The purpose of this chapter is –

(1) to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;

(2) to minimize the cost to the Federal Government of collecting, maintaining, using, and disseminating information;

(3) to maximize the usefulness of information collected, maintained, and disseminated by the Federal Government;

(4) to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices;

* * * * *

§ 3502. Definitions

As used in this chapter –

* * * * *

(3) the term "burden" means the time, effort, or financial resources expended by persons to provide information to a Federal agency;

(4) the term "collection of information" means the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either –

(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes;

* * * * *

(11) the term "information collection request" means a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or other similar method calling for the collection of information;

* * * * *

(16) the term "practical utility" means the ability of an agency to use information it collects, particularly the capability to process such information in a timely and useful fashion; and

(17) the term "recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records.

* * * * *

§ 3504. Authority and functions of Director

(a) The Director shall develop and implement Federal information policies, principles, standards, and guidelines and shall provide direction and oversee the review and approval of information collection requests, the reduction of the paperwork burden, Federal statistical activities, records management activities, privacy and security of

records, agency sharing and dissemination of information, and acquisition and use of automatic data processing, telecommunications, and other information technology for managing information resources. The authority of the Director under this section shall be exercised consistent with applicable law.

* * * * *

(c) The information collection request clearance and other paperwork control functions of the Director shall include –

(1) reviewing and approving information collection requests proposed by agencies;

(2) determining whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency;

* * * * *

(h)(1) As soon as practicable, but no later than publication of a notice of proposed rulemaking in the Federal Register, each agency shall forward to the Director a copy of any proposed rule which contains a collection of information requirement and upon request, information necessary to make the determination required pursuant to this section.

(2) Within sixty days after the notice of proposed rulemaking is published in the Federal Register, the Director may file public comments pursuant to the standards set forth in section 3508 on the collection of information requirement contained in the proposed rule.

(3) When a final rule is published in the Federal Register, the agency shall explain how any collection of information requirement contained in the final rule responds

to the comments, if any, filed by the Director or the public, or explain why it rejected those comments.

(4) The Director has no authority to disapprove any collection of information requirement specifically contained in an agency rule, if he has received notice and failed to comment on the rule within sixty days of the notice of proposed rulemaking.

(5) Nothing in this section prevents the Director, in his discretion—

(A) from disapproving any information collection request which was not specifically required by an agency rule;

(B) from disapproving any collection of information requirement contained in an agency rule, if the agency failed to comply with the requirements of paragraph (1) of this subsection; or

(C) from disapproving any collection of information requirement contained in a final agency rule, if the Director finds within sixty days of the publication of the final rule that the agency's response to his comments filed pursuant to paragraph (2) of this subsection was unreasonable.

(D) from disapproving any collection of-information requirement where the Director determines that the agency has substantially modified in the final rule the collection of information requirement contained in the proposed rule where the agency has not given the Director the information required in paragraph (1), with respect to the modified collection of information requirement, at least sixty days before the issuance of the final rule.

(6) The Director shall make publicly available any decision to disapprove a collection of information requirement contained in an agency rule, together with the reasons for such decision.

(7) The authority of the Director under this subsection is subject to the provisions of section 3507(c).

(8) This subsection shall apply only when an agency publishes a notice of proposed rulemaking and requests public comments.

(9) There shall be no judicial review of any kind of the Director's decision to approve or not to act upon a collection of information requirement contained in an agency rule.

* * * * *

§ 3506. Federal agency responsibilities

(a) Each agency shall be responsible for carrying out its information management activities in an efficient, effective, and economical manner, and for complying with the information policies, principles, standards, and guidelines prescribed by the Director.

* * * * *

§ 3507. Public information collection activities – Submission to Director; approval and delegation

(a) An agency shall not conduct or sponsor the collection of information unless, in advance of the adoption or revision of the request for collection of such information –

(1) the agency has taken actions, including consultation with the Director, to –

(A) eliminate, through the use of the Federal Information Locator System and other means, information collections which seek to obtain information available from another source within the Federal Government;

(B) reduce to the extent practicable and appropriate the burden on persons who will provide information to the agency; and

(C) formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public;

(2) the agency (A) has submitted to the Director the proposed information collection request, copies of pertinent regulations and other related materials as the Director may specify, and an explanation of actions taken to carry out paragraph (1) of this subsection, and (B) has prepared a notice to be published in the Federal Register stating that the agency has made such submission and setting forth a title for the information collection request, a brief description of the need for the information and its proposed use, a description of the likely respondents and proposed frequency of response to the information collection request, and an estimate of the burden that will result from the information collection request; and

(3) the Director has approved the proposed information collection request, or the period for review of information collection requests by the Director provided under subsection (b) has elapsed.

(b) The Director shall, within sixty days of receipt of a proposed information collection request, notify the agency involved of the decision to approve or disapprove the request and shall make such decisions, including an explanation thereof, publicly available. If the Director determines that a request submitted for review cannot be reviewed within sixty days, the Director may, after notice to the agency involved, extend the review period for an additional thirty days. If the Director does not notify the agency of an extension, denial, or approval within sixty days (or, if the Director has extended the review period for an additional thirty days and does not notify the agency of a denial or approval within the time of the extension), a control number shall be assigned without further delay,

the approval may be inferred, and the agency may collect the information for not more than one year.

(c) Any disapproval by the Director, in whole or in part, of a proposed information collection request of an independent regulatory agency, or an exercise of authority under section 3504(h) or 3509 concerning such an agency, may be voided, if the agency by a majority vote of its members overrides the Director's disapproval or exercise of authority. The agency shall certify each override to the Director, shall explain the reasons for exercising the override authority. Where the override concerns an information collection request, the Director shall without further delay assign a control number to such request, and such override shall be valid for a period of three years.

(d) The Director may not approve an information collection request for a period in excess of three years.

* * * * *

§ 3508. Determination of necessity for information; hearing

Before approving a proposed information collection request, the Director shall determine whether the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility. Before making a determination the Director may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines that the collection of information by an agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

* * * * *

§ 3516. Rules and regulations

The Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this chapter.

* * * * *

§ 3518. Effect on existing laws and regulations

(a) Except as otherwise provided in this chapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information activities is subject to the authority conferred on the Director by this chapter.

* * * * *

(e) Nothing in this chapter shall be interpreted as increasing or decreasing the authority of the President, the Office of Management and Budget or the Director thereof, under the laws of the United States, with respect to the substantive policies and programs of departments, agencies and offices, including the substantive authority of any Federal agency to enforce the civil rights laws.

* * * * *

B. OMB Regulations Implementing the Paperwork Reduction Act (5 C.F.R. Pt. 1320)

PART 1320 – CONTROLLING PAPERWORK BURDEN ON THE PUBLIC

§ 1320.1 Purpose.

The purpose of this part is to implement the provisions of the Paperwork Reduction Act of 1980, as amended, (44 U.S.C. Chapter 35) (the Act) concerning collections of information. It is issued under the authority of section 3516 of the Act, which provides that "The Director shall promulgate rules, regulations, or procedures necessary to exercise the authority provided by this Chapter." It is designed to minimize and control burdens associated with the collection of information by Federal agencies from individuals, businesses and other private institutions, and State and local governments. * * *

§ 1320.4 General requirements.

* * * * *

(b) To obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that:

(1) The collection of information is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives;

(2) The collection of information is not duplicative of information otherwise accessible to the agency; and

(3) The collection of information has practical utility. The agency shall also seek to minimize the cost to itself of collecting, processing, and using the information, but shall not do so by means of shifting disproportionate costs or burdens onto the public. * * *

(c) OMB shall determine whether the collection of information, as submitted by the agency, is necessary for the proper performance of the agency's functions. In making this determination, OMB will take into account the criteria listed in § 1320.4(b), and will consider whether the burden of the collection of information is justified by its practical utility. In addition:

(1) OMB will consider necessary any collection of information specifically mandated by statute or court order, but will independently assess any collection of information to the extent that the agency exercises discretion in its implementation; and

(2) OMB will consider necessary any collection of information specifically required by an agency rule approved or not acted upon by OMB pursuant to §§ 1320.13 or 1320.14, but will independently assess any such collection of information to the extent that it deviates from the specifications of the rule.

(d) Except as provided in § 1320.20, to the extent that OMB determines that all or any portion of a collection of information by an agency is unnecessary, for any reason, the agency shall not engage in such collection or portion thereof.

* * * * *

§ 1320.7 Definitions.

For purposes of implementing the Paperwork Reduction Act and this Part, the following terms are defined as follows:

* * * * *

(b) "Burden" means the total time, effort, or financial resources required to respond to a collection of information, including that to read or hear instructions; to

develop, modify, construct, or assemble any materials or equipment; to conduct tests, inspections, polls, observations, or the like necessary to obtain the information; to organize the information into the requested format; to review its accuracy and the appropriateness of its manner of presentation; and to maintain, disclose, or report the information.

* * * * *

(c) "Collection of information" means the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, or identical reporting or recordkeeping requirements, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the "obtaining or soliciting of information" includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. In the Act, a "collection of information requirement" is a type of "information collection request." As used in this Part, a "collection of information" refers to the act of collecting information, to the information to be collected, to a plan and/or an instrument calling for the collection of information, or any of these, as appropriate.

(1) A "collection of information" includes the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods. Similar methods may include contracts, agreements, policy statements, plans, information collection requests, collection of information requirements, rules or regulations, information collection requests or collection of information requirements contained in, derived from, or authorized by such rules or regulations, planning requirements, circulars, directives, instructions, bulletins, requests for proposal or other

procurement requirements, interview guides, oral communications, disclosure requirements, labeling requirements, telegraphic or telephonic requests, automated collection techniques, and standard questionnaires used to monitor compliance with agency requirements.

(2) Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the "collection of information" whenever the same requirement to obtain or compile information would be a "collection of information" if the information were directly provided to the agency. The public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within this definition.

* * * * *

(o) "Practical utility" means the actual, not merely the theoretical or potential, usefulness of information to an agency, taking into account its accuracy, adequacy, and reliability, and the agency's ability to process the information in a useful and timely fashion. In determining whether information will have "practical utility," OMB will take into account whether the agency demonstrates actual timely use for the information either to carry out its functions or to make it available to the public, either directly or by means of a public disclosure or labeling requirement, for the use of persons who have an interest in entities or transactions over which the agency has jurisdiction. In the case of general purpose statistics or recordkeeping requirements, "practical utility" means that actual uses can be demonstrated.

(p) "Recordkeeping requirement" means a requirement imposed by an agency on persons to maintain specified records and includes requirements that information be maintained or retained by persons but not necessarily provided to an agency.

(q) "Reporting requirement" means a requirement imposed by an agency on persons to provide information to another person or to the agency. Reporting requirements may implicitly or explicitly include related recordkeeping requirements.

* * * * *

§ 1320.13 Clearance of collections of information in proposed rules.

Agencies shall submit collections of information contained in proposed rules published for public comment in the *Federal Register* in accordance with the following requirements:

(a) The agency shall include, in accordance with the requirements set forth in § 1320.15, in the preamble to the Notice of Proposed Rulemaking a statement that the collections of information contained in the rule, and identified as such, have been submitted to OMB for review under section 3504(h) of the Act. * * *

(b) All such submissions shall be made to OMB not later than the day on which the Notice of Proposed Rulemaking is published in the *Federal Register*, in such form and in accordance with such procedures as the Director may direct. Such submissions shall include a copy of the proposed regulation and preamble.

(c) Within 60 days of publication of the proposed rule, OMB may file public comments on collection of information provisions. Such comments shall be in the form of an OMB Notice of Action, which shall be sent to the Senior

Official or agency head, or their designee, and which shall be made a part of the agency's rulemaking record.

(d) If an agency submission is not in compliance with paragraph (b) of this section, OMB may disapprove the collection of information in the proposed rule within 60 days of receipt of the submission. If an agency fails to submit a collection of information subject to this section, OMB may disapprove it at any time.

* * * * *

(g) On or before the date of publication of the final rule, the agency shall submit the final rule to OMB, unless it has been approved pursuant to § 1320.13(f) (and not substantively or materially modified by the agency after approval). Not later than 60 days after publication OMB shall approve, modify, or disapprove the collection of information contained in the final rule. Any such disapproval may be based on one or more of the following reasons, as determined by OMB:

(1) The agency failed to comply with paragraph (b) of this section;

(2) The agency had substantially modified the collection of information contained in the final rule from that contained in the proposed rule, without providing OMB with notice of the change of sufficient information to make a determination concerning the modified collection of information at least 60 days before publication of the final rule; or

(3) In cases where OMB had filed public comments pursuant to paragraph (c) of this section, the agency's response to such comments was unreasonable, and the collection of information is unnecessary for the proper performance of the agency's functions.

* * * * *

(i) OMB shall not approve any collection of information for a period longer than three years. Approval of any collection of information submitted under this Section will be for the full three-year period, unless the Director determines that there are special circumstances requiring approval for a shorter period.

* * * * *

§ 1320.22 Other authority.

(a) The Director shall determine whether any collection of information or other matter is within the scope of the Act, or of this Part.

(b) In appropriate cases, after consultation with the agency, the Director may initiate a rulemaking proceeding to determine whether an agency's collection of information is consistent with statutory standards. Such proceedings shall be in accordance with informal rulemaking procedures under 5 U.S.C. Chapter 5.

(c) Each agency is responsible for complying with the information policies, principles, standards, and guidelines prescribed by the Director.

(d) To the extent permitted by law, the Director may waive any requirements contained in this Part.

(e) Nothing in this Part shall be interpreted to limit the authority of the Director under the Paperwork Reduction Act of 1980, the Paperwork Reduction Reauthorization Act of 1986, or any other law. Nothing in this Part, the Paperwork Reduction Act of 1980, or the Paperwork Reduction Reauthorization Act of 1986 shall be interpreted as increasing or decreasing the authority of OMB with respect to the substantive policies and programs of the agencies.

* * * * *

C. The Bureau of the Budget's Superseded Regulation Implementing the Federal Reports Act (Regulation A (Feb. 13, 1943))

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
Washington, D.C.

February 13, 1943

REGULATION A

Federal Reporting Services
Clearance of Plans and Report Forms

In pursuance of the authority granted in Section 6 of the Federal Reports Act of 1942, in furtherance of the policies stated in the act, and in order especially to provide for the review and clearance of plans and report forms used by Federal agencies in the collection of information as required by Section 5, the following rules and regulations are promulgated:

Title I – *Definitions* and *Explanations*

1. In this Regulation –

(a) The term "act" shall mean the Federal Reports Act of 1942. Section 5 of the act reads as follows:

> "No Federal agency shall conduct or sponsor the collection of information, upon identical items, from ten or more persons (other than Federal employees considered as such) unless, in advance of adoption or revision of any plans or forms to be used in such collection,
>
> "(a) The agency shall have submitted to the Director such plans or forms, together with copies of such pertinent regulations and other related materials as the Director shall specify; and
>
> "(b) The Director shall have stated that he does not disapprove the proposed collection of information."

(b) The term "Federal agency" shall mean any executive department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration in the executive branch of the Government, *Provided,* That it does not include the government of the District of Columbia or of any territory or possession of the United States, or any subdivision thereof; the General Accounting Office; the Bureau of Internal Revenue, the Comptroller of the Currency, the Bureau of the Public Debt, the Bureau of Accounts, or the Division of Foreign Funds Control of the Treasury Department; or any Federal bank supervisory agency to the extent that such agency obtains reports and information from banks as provided or authorized by law and in the proper performance of its supervisory functions.

(c) The term "Director" shall mean the Director of the Bureau of the Budget. The term "Assistant Director" shall mean the Assistant Director of the Bureau of the Budget in charge of the Division of Statistical Standards or his designated representative.

(d) The term "report form" shall mean or include any application form or other administrative report form, questionnaire, telegraphic request, or other similar device for the collection of information.

(e) The term "plan" shall mean or include:

(1) Any general or specific requirement for the establishment or maintenance of records (including systems of accounts and systems of classification) which are to be used or be available for use in the collection of information.

(2) Any requirement or instruction affecting the content, preparation, return, or use of a plan or report form.

(f) The term "requirement" shall be deemed to include a recommendation, order, regulation, or other directive, but shall not apply to a general directive (in an order or regulation) which imposes a general duty to maintain such records or submit such reports as may thereafter or otherwise be specifically prescribed by appropriate authority. Such general directives shall, however, state that specific recording or reporting requirements subsequently prescribed will be "subject to the approval of the Bureau of the Budget pursuant to the Federal Reports Act of 1942."

(g) The term "information" shall mean facts or opinions obtained or made available by the use of a plan or report form.

(h) "Clearance" of a plan or report form shall mean and include (1) a determination that the information to be sought or provided thereby is reasonably needed by the agency concerned in the proper performance of its functions or otherwise, and (2) authorization to use the plan or report form in the collection or recording of such information in the manner proposed, or on such other conditions as the Assistant Director may prescribe, with an approval number, notation, or other appropriate device inscribed or endorsed thereon to indicate clearance, as herein prescribed. Such clearance shall constitute a declaration by the Director, in accordance with section 5 of the act, that he does not disapprove the collection of information in the manner proposed. A withholding of clearance shall constitute among other things a determination in pursuance of section 3(d) of the act that the collection of information in the manner proposed is unnecessary.

(i) The term "person" shall mean any individual, partnership, association, corporation, business trust, or legal representative, any organized group of persons, any State or territorial government or branch thereof, any political

subdivision of any State or territory or any branch of any such political subdivision.

(j) The term "respondent" shall mean any person, or any agency employee or instrumentality of the Federal Government, from whom information is obtained or requested on a plan or report form.

(k) Any plan or report form shall be deemed to be "used" by an agency when its use is wholly or partly sponsored, controlled, or contracted for by the agency.

(l) "Unnecessary duplication" shall be deemed to exist in the collection of information if the duplicating activities involve either identical information or information adequately similar for satisfactory use.

Title II – *Clearance Requirements*

2. (a) *General.* No plan or report form (as herein limited or described) shall be used or prescribed by a Federal agency in the collection or recording of information without first obtaining clearance thereof from the Assistant Director and inscribing or endorsing thereon, to indicate such clearance, an approval number, notation, or other appropriate device, as herein prescribed. The provisions of this title shall apply only to (1) plans and report forms which require or call for information of an identical nature (or the recording thereof) from ten or more persons other than Federal employees considered as such, and (2) report forms which call for information of an identical nature from agencies, employees, or instrumentalities of the Federal Government, which is to be used for statistical compilations of general public interest, including compilations showing the status or implementation of Federal activities and programs.

(b) *Report Forms.* Clearance of a report form shall be evidenced or indicated by printing or inscribing on each

copy so used, in the upper right-hand corner of the first page, an approval number assigned to it by the Assistant Director, in the following manner:

(1) When no time limit is assigned to the use of the report form, the following style shall be employed:

Form Approved
Budget Bureau No. 00-R000

(2) When a time limit is assigned to the use of the report form, the date of expiration shall be shown as follows:

Budget Bureau No. 00-R000
Approval Expires (date)

No report form shall be used after its expiration date without resubmission and further clearance prior thereto.

(c) *Plans.* Clearance of plans for use in the collection or recording of information shall be evidenced by printing or inscribing on each plan so used the following endorsement or such other device as may be required by the Assistant Director:

> This . . . . (regulation, order, instruction, or other requirement) . . . has been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

(d) *Termination of Clearance and Use.* Upon notice by the Assistant Director, authority or permission to use any approval number or other device signifying clearance shall terminate and use thereof shall be discontinued, notwithstanding any time limit or expiration date previously fixed.

3. (a) *Submittal for Clearance.* In order to obtain review and clearance of a plan or report form, two copies thereof shall be submitted to the Assistant Director in time to allow for adequate review and the adoption of any necessary alterations (including coordination or integration with other plans and report forms) without delaying

the operating program to which the plan or report form relates. Such submittal shall be accompanied by a copy of Form DSS 37, and shall include the following statements and such other information as the Assistant Director shall require:

(1) A brief statement of justification for the plan or report form in terms of its relation to a specified operating program, research function, or other Federal or non-Federal activity.

(2) A statement of any provisions or arrangements, whether prescribed by law or otherwise operative, which make the information confidential or otherwise limit its use by any other persons or organizations.

(3) Whenever it is the intention to employ the plan or report form with regard to an entire class of respondents, a statement justifying such procedure and explaining why it would not be satisfactory and feasible to use an abridged version thereof for particular segments of the class (such as small business enterprises) or to collect or process such information from a segment or sample of the class.

(4) A statement or other assurance satisfactory to the Assistant Director that the material submitted has been reviewed by each unit (in the same department or independent establishment) which may have an interest therein or may have already collected or otherwise dealt with the same or similar information, or may have need therefor, and that there is no unnecessary duplication within the department or independent establishment.

(b) *Other Material.* In addition to the foregoing, there shall be submitted for examination or clearance such other material pertaining to the collection, processing, tabula-

tion, analysis, or publication of information as may from time to time be required by the Assistant Director.

(c) *Practical Utility.* To minimize the reporting burden on respondents, especially individuals and small business enterprises, and to improve governmental efficiency, each Federal agency shall consider and determine, in connection with each plan or report form submitted, whether the proposed plan or report form exceeds the limits of reasonable need or practical utility, either with respect to number of respondents, frequency of collection, number and difficulty of the items, or otherwise, and whether all of the items of information to be furnished or recorded are essential to the central purpose of such plan or report form. Clearance of plans and report forms submitted will be withheld whenever it appears to the Assistant Director that this requirement has not been met.

4. *Revision.* Before a material revision or change shall be made in a plan or report form for which clearance is required, or in the use thereof, further clearance shall be obtained from the Budget Bureau in the manner prescribed in this regulation, by submitting pertinent data or explanation in relation thereto on Form DSS 37 or otherwise. A material revision or change in a plan or report form or the use thereof, necessitating further clearance, shall mean or include any significant revision in (a) the kind or amount of information sought, (b) the number and identity of respondents, and (c) the time or frequency of reporting. It shall also include a transfer of the duty or function of collecting, processing, or tabulating the information, either into, or out of, or within a Federal agency.

Title III – *Use of Exempt Forms*

5. (a) *Granting of Exemptions.* Exemptions from clearance may be granted by the Assistant Director with

respect to affidavits, oaths, certifications, and other plans and report forms which do not call for information of substantial volume or importance.

(b) *Advisory Review.* Any plan or report form that is outside the purview of this regulation, or any other form or reporting requirement, may be submitted to the Assistant Director for advisory review and, when desired, assignment of an approval number or other clearance device, pursuant to section 2(a), in order to facilitate the use thereof.

(c) *Notation on Exempt Forms.* In order otherwise to facilitate compliance with forms and reporting requirements for which clearance is not required by this regulation and has not been obtained in pursuance of the preceding paragraph, or with respect to which exemption may have been granted by the Assistant Director, and otherwise to minimize uncertainty and misunderstanding in connection with the use thereof, the following notation may be used thereon by the agency concerned, preferably in the upper right-hand corner of the first page:

Approval of Budget Bureau
not required.

The foregoing includes:

(1) Plans and report forms used by Federal agencies that are not subject to the act or this regulation, and those which are used in the collection (or recording) of information from less than ten persons or in other circumstances not covered by section 2(a).

(2) Forms and reporting requirements other than those herein defined as a plan or report form.

(d) *Termination of Exemption.* The use of the foregoing notation shall be discontinued, and an approval number or other appropriate clearance device shall be required in its place, whenever it shall be determined by the

Assistant Director (in the absence of an authoritative ruling to the contrary) that the plan, report form, or other request for data is within the purview of section 2(a) of this regulation.

Title IV – *Miscellaneous*

6. *Deviation from Terms of Clearance.* No deviation shall be made in the use of any plan or report form, or any clearance device, from the terms and conditions on which clearance shall have been granted hereunder.

7. *Notice of Discontinuance.* Whenever the use of a plan or report form to which an approval number has been assigned is discontinued, except by expiration of a time limit fixed in pursuance of section 2(b), the Assistant Director shall be notified by the responsible agency.

8. *Records and Reports.* Each Federal agency shall afford the Assistant Director access to its records concerning the status and use of each plan and report form, and shall make such improvements in the records and such reports therefrom as the Assistant Director shall prescribe.

9. *Waivers and Other Determinations by Bureau.* Any provision of this regulation may be waived in writing by the Assistant Director, and the determination of the Assistant Director as to whether any plan, report form, activity, or other matter is within the scope of the act or this regulation shall be controlling.

10. *Delegation of Director's Authority.* The authority conferred by the act on the Director may be exercised by the Assistant Director to the extent necessary or appropriate for the performance of any function or duty prescribed by this regulation.

11. *General Authority.* This regulation shall not be deemed to limit or preclude exercise of the authority vested in the Bureau by Executive Order 8248, or otherwise, to plan and promote the improvement, development, and coordination of Federal and other statistical services.

12. *Revocations.* Budget Circular No. 77 and Budget Circular No. 337 are hereby superseded, insofar as they govern the collection, processing, analysis, and publication of information as herein defined. The following are revoked: Budget Circular 351; Budget Circular 360 and Supplement No. 1 thereto; and subsections 4(b) to 4(f), inclusive, of Budget Circular 379.

13. *Forms Already in Use.* With respect to report forms which, having been previously cleared by the Bureau of the Budget, are in use on the effective date of this regulation in conformity with Budget Circular 360 and Supplement No. 1 thereto, such previous clearance shall be deemed to satisfy the requirements of section 2(a) and to constitute clearance under this regulation, subject to the provisions hereof and to such further action as may be required or taken by the Assistant Director hereunder. Plans in use on the effective date of this regulation, whether or not previously cleared under Budget Circular 360 and Supplement No. 1 thereto, shall be deemed to have been granted clearance for the purposes of title II of this regulation, subject to termination of clearance as herein provided.

14. *Effective Date.* This regulation shall be effective February 15, 1943.

HAROLD D. SMITH
Director